

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VINITA D. CASH

Claimant

VS.

HALSTEAD HOSPITAL

Respondent

AND

CONTINENTAL INSURANCE COMPANY

Insurance Carrier

Docket Nos. 179,458 & 179,459

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge David A. Shufelt on December 20, 1995. The Appeals Board heard oral argument April 18, 1996.

APPEARANCES

Claimant appeared by her attorney Steven R. Wilson of Wichita, Kansas. Respondent and its insurance company appeared by their attorney Christopher J. McCurdy of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award and has reviewed and considered the record listed in the Award.

ISSUES

The Award in this case involves two separate accidents. The first, Docket No. 179,458, involves an alleged injury to claimant's back in June of 1991. On this claim respondent disputes the finding that the injury arose out of and in the course of employment and disputes the finding that the injury resulted in a 51 percent work disability. The second claim, Docket No. 179,459, involves injury to the knee which manifested itself in August of 1992. Respondent also disputes the finding that this injury arose out of and in the course of employment. Neither party disputes the finding that claimant has a 13 percent disability to the left lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) In June 1991 claimant sustained a low-back injury by accident in the course of her employment with respondent while lifting a patient from a chair to the toilet. She reported the injury and received conservative medical care, including physical therapy. According to the claimant, the pain from the injury never completely resolved and continued to worsen throughout the remainder of employment with respondent.

On the basis of claimant's testimony and the supporting medical opinion of Dr. Lawrence R. Blaty, the Appeals Board agrees with the decision by the Special Administrative Law Judge finding claimant suffered a low-back injury which arose out of and in the course of her employment. The Appeals Board recognizes that in Dr. Robert Eyster's opinion the work injury contributed only minimally, if at all, to claimant's ultimate impairment. The Appeals Board is persuaded by claimant's testimony that following the injury, her symptoms worsened and she did not return to her pre-injury condition.

(2) The Appeals Board also finds that claimant suffered accidental injury to her knee arising out of and in the course of her employment in August 1992. The evidence relating to the knee injury, again, is resolved in favor of the opinion expressed by Dr. Blaty that the work activities, including walking on concrete floors, aggravated a preexisting degenerative condition of the claimant's knee. Dr. Eyster attributes the knee injury primarily to claimant's weight and the preexisting degenerative condition. He describes claimant's weight and genetics as the cause and also describes claimant's activity as the force. Dr. Eyster's opinion does not, in our opinion, overcome Dr. Blaty's opinion that the work activities were an aggravating factor.

The Appeals Board also agrees with the conclusion of the Special Administrative Law Judge that walking on concrete floors, while it may be an activity engaged in by individuals as a general life activity, is, nevertheless, a compensable injury where, as here, walking on the concrete floor at work aggravates or intensifies a preexisting condition.

(3) The Appeals Board finds that claimant sustained a 10 percent general body functional impairment as a result of the low-back injury.

As previously indicated, claimant injured her low back in June 1991 while lifting a patient from a chair to the toilet. She continued to work and suffered the above-described injury to her knee in August 1992. In May of 1993, almost two years after the low-back injury, respondent terminated her employment. Claimant testified respondent terminated her because respondent did not believe she could continue to perform the job. Her testimony also suggests the problems she was having with her knee were a substantial factor in the decision.

Although the Special Administrative Law Judge awarded work disability, the Appeals Board has concluded that the award for the back injury should be limited to functional impairment. Claimant worked for two years following her low-back injury in the same capacity as she had prior to that injury. There is a presumption of no work disability when the claimant returns to work at a comparable wage. K.S.A. 1990 Sup. 44-510e. In this case the Appeals Board does not find evidence which would overcome that presumption.

Claimant missed work often and left, in part, because of the subsequent left knee injury. Nothing in the record suggests claimant would have left her employment because of the back injury alone. For the knee injury, claimant is entitled to benefits based on functional impairment to the lower extremity. K.S.A. 1992 Supp. 44-510d.

In addition, the record does not contain evidence from which one could determine the work disability for the back injury alone. The record contains testimony of two witnesses regarding the effect of claimant's injuries on her ability to retain work in the open labor market and ability to earn comparable wages. Those opinions, expressed by Ms. Karen Terrill and Mr. Jerry Hardin, are based upon restrictions which include restrictions for the knee injury.

The record in this case does not establish a general body injury which resulted in work disability. If claimant came to work for the respondent with a preexisting low-back injury and then suffered a knee injury, in the Board's view, the respondent would not be responsible for general body or work disability benefits even where the knee injury rendered the claimant, in combination with the back injury, unable to continue the work for respondent. The current circumstances are not materially different.

The Appeals Board, therefore, concludes that the award should be limited to functional impairment. The only testimony regarding the extent of functional impairment is the opinion expressed by Dr. Blaty that claimant sustained a 10 percent permanent partial general body disability as a result of the back injury. The Appeals Board therefore finds that claimant should be entitled to benefits for a 10 percent general body disability as a result of the back injury of June 1991.

AWARD IN DOCKET NO. 179,458

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Vinita D. Cash, and against the respondent, Halstead Hospital, and the insurance carrier, Continental Insurance Company, for an accidental injury sustained on June 1, 1991.

Claimant is entitled to 19.29 weeks of temporary total disability at the rate of \$215.10 per week or \$4,149.27, followed by 395.71 weeks at the rate of \$21.51 per week or \$8,511.72 for a 10 percent permanent partial general body disability making a total award of \$12,660.99.

As of May 31, 1996, there will be due and owing to the claimant 19.29 weeks of temporary total disability compensation at the rate of \$215.10 per week in the sum of \$4,149.27, plus 241.57 weeks at the rate of \$21.51 per week in the sum of \$5,196.17 for a total due and owing of \$9,345.44 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$3,315.55 shall be paid at the rate of \$21.51 per week of 154.14 weeks or until further order of the Director.

AWARD IN DOCKET NO. 179,459

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Vinita D. Cash, and against the respondent, Halstead Hospital, and the insurance carrier, Continental Insurance Company, for an accidental injury sustained on August 12, 1992.

The compensable weeks for a scheduled injury are computed as follows:

The 200 weeks on the schedule minus 0 weeks of temporary total equals 200 times 13 percent of disability equals the number of compensable weeks. Therefore, the claimant is entitled to 26 weeks of permanent partial compensation at the rate of \$215.10 per week in the amount of \$5,592.60 for a 13 percent loss of use of the left lower extremity. The entire amount is due and ordered paid in one lump sum less any amounts previously paid.

FURTHER AWARD IS MADE that claimant is entitled to medical expenses, and any unauthorized medical expenses if any.

Future medical will be considered upon proper application.

The Court finds attorney fee retainer is reasonable and approves such fee arrangement.

Therefore, pursuant to K.S.A. 44-536, a lien is placed against the award in the amount of 25 percent in favor of Mr. Steve Wilson, subject to the lien of Mr. Joseph Seiwert who has on file an attorney lien in the amount of \$1,803.83, and such amount shall be retained by respondent in trust pending further order of the Court.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

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| OWENS, BRAKE & ASSOCIATES | |
| Preliminary Hearing Transcript | \$ 71.96 |
| OWENS, BRAKE, COWAN & ASSOCIATES | |
| Regular Hearing Transcript | \$290.20 |
| ALEXANDER REPORTING COMPANY | |
| Deposition of Dr. Lawrence Blaty | \$ 83.72 |
| Deposition of Jerry Hardin | 194.60 |
| Total | \$278.32 |
| COURT REPORTING SERVICE | |
| Deposition of Dr. Robert Eyster | \$ 126.90 |
| Deposition of Karen Crist Terrill | 141.80 |
| Total | \$ 268.70 |

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven Wilson, Wichita, Kansas
Christopher J. McCurdy, Wichita, Kansas
David A. Shufelt, Special Administrative Law Judge
Philip S. Harness, Director